



October 24, 2016

BY ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: NOTICE OF EX PARTE

WC Docket No. 16-143: *Business Data Services in an Internet Protocol Environment*

WC Docket No. 15-247: *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*

WC Docket No. 05-25: *Special Access for Price Cap Local Exchange Carriers*

RM-10593: *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*

Dear Ms. Dortch:

On October 20, Elizabeth Barket, Law & Regulatory Counsel for CCA, John Nakahata of Harris, Wiltshire & Grannis, representing CCA, and I met with Travis Litman, Legal Advisor to Commissioner Rosenworcel, to discuss the above-captioned docket.

CCA expressed disappointment that the circulated Business Data Services (“BDS”) item, as described in the Fact Sheet,¹ does not address Ethernet other than through a broadly-described complaint process. As the record reflects,² ensuring competitive carriers have access to Ethernet

¹ Federal Communications Commission, *Chairman Wheeler's Proposal To Promote Fairness, Competition, And Investment In The Business Data Services Market* (rel. Oct. 7 2016), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1007/DOC-341659A1.pdf (“Fact Sheet”).

² See Comments of Competitive Carriers Association, WC Docket Nos. 05-25, 15-247, 16-143 (filed June 28, 2016) (“CCA Comments”); Reply Comments of Competitive Carriers Association, WC Docket Nos. 05-25, 15-247, 16-143 (filed Aug. 9, 2016) (“CCA Reply Comments”); *Ex Parte* Letter from Steven K. Berry, President & CEO, CCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-25, 15-247, 16-143 (filed Aug. 3, 2016); *Ex Parte* Letter from Rebecca Murphy Thompson, EVP & General Counsel, CCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-25, 15-247, 16-143 (filed Aug. 5, 2016); *Ex Parte* Letter from Rebecca Murphy Thompson, EVP & General Counsel, CCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-25, 15-247, 16-143 (filed Sep. 9, 2016); see also Raul Katz, *Assessment of the Impact of the Business Data Services Market Dynamics on Innovation and Competition in the U.S. Wireless Market*, TELECOM ADVISORY SERVICES, LLC, (July 2016), attached as Exhibit 1 (“Katz Study”).

BDS for backhaul at just and reasonable rates, uninhibited by undue exercise of market power, is critical to migrating *all* carriers and consumers to next generation technology. And if it wants to have a positive impact on 5G, the FCC must act quickly to foster competition in the BDS market.

During the meeting, CCA expressed its opposition to any conclusion, tentative or otherwise, that Ethernet-provided BDS markets are broadly competitive. While this may be true in some markets, the record in this proceeding clearly does not support a conclusion that Ethernet is competitive in all markets nationwide.³ Establishing this precedent would frustrate future efforts to revisit a framework for securing affordable BDS services to support 5G deployment, much less affordable Ethernet services for 2G, 3G or 4G deployment. The Commission should not effectively thwart efforts to assess the competitive state of Ethernet-based BDS services, which CCA believes suffers from the same market power concerns plainly found in the provision of TDM-based BDS.

Further, CCA explained how the Commission can still provide significant relief for competitive wireless carriers with improvements to the item. Specifically, to ensure carriers can transition to next generation technologies, the Commission should: (1) adopt a presumption that the Ethernet market, in addition to TDM, at 50 Mbps and below is not competitive; (2) seek comment in its FNPRM on CCA's proposal for high-capacity BDS, that establishes a competitive market test based on census blocks and actual connections to identify areas where competition is not adequately disciplining high-capacity Ethernet prices, as well as remedies to establish just and reasonable rates in these uncompetitive areas; and, (3) improve the complaint process by establishing clear rules rather than soft guidelines, and an expedited timeframe for resolution. These small changes to the currently-circulated BDS item will support faster deployment of innovative 5G mobile service.

Because of the importance of Ethernet to wireless carriers, CCA urged in its recent meetings to promptly adopt a presumption that the market for "low-capacity" BDS at 50 Mbps and below—

³ See Comments of Sprint Corporation, WC Docket Nos. 16-143, 05-25, RM-10593, at 27 (filed June 28, 2016) ("Sprint Comments") ("[T]he record . . . demonstrates that the marketplace for higher-bandwidth BDS offerings is not adequately competitive. At best, the record shows that competitive conditions vary depending on the location, but most often are insufficient to produce competitive pricing"); see also Reply Comments of Sprint Corporation, WC Docket Nos. 16-143, 05-25, RM-10593, at 37-41 (filed Aug. 9, 2016) ("Sprint Reply Comments"); CCA Comments at 3-4, 7-8; Comments of Birch, EarthLink, and Level 3, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 28-35 (filed June 28, 2016) ("Joint CLEC Comments"); Reply Comments of Level 3, WC Docket Nos. 16-143, 05-25, RM-10593, at 5 (filed Aug. 9, 2016); Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services ¶ 31, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, ¶ 4 (filed June 28, 2016) (revised public version submitted July 14, 2016) ("[T]here is no 'critical bandwidth level between 45 Mbps and 1 Gbps beyond which ease of entry reduces competitive concerns so much as to make regulation unnecessary'"); Declaration of John Kwoka ¶44, attached as Exhibit A to Sprint Comments ("Market concentration data supports 'a more confident prediction of anticompetitive effects from high concentration and small numbers of effective competitors'"); Further Supplemental Declaration of William P. Zarakas, Tables 5-6, appended as Attachment A to Sprint Reply Comments (For circuits greater than 50 Mbps, no more than one ILEC and one competitive provider provide BDS circuits in about 83% of census blocks and 94% of locations).

whether provided over TDM or Ethernet—is uncompetitive.⁴ While not a long-term solution for 5G, many competitive carriers still need TDM and low-capacity Ethernet at just and reasonable rates to support their 2G, 3G and 4G networks.⁵ The data on record sufficiently supports adopting this presumption pending further review in a robust FNPRM. This would help to provide relief to competitive carriers still employing low-capacity BDS.

Further, CCA stated that the FNPRM should pave the way for a long-term Ethernet pricing remedy solution to “future-proof” this proceeding. Without adopting conclusions as to whether Ethernet is competitive, the Commission should seek comment on specific proposals and precise remedies, including benchmarks or price caps for BDS above 50 Mbps, in light of continued growth of wireless bandwidth needs and to what extent new technologies and new entrants can help to constrain market power. For example, CCA’s proposal for a competitive market test based on actual connections in a census block (or adjacent census block) should be considered as part of the FNPRM.⁶ In addition, should the Commission have questions as to whether price regulation is feasible, it should seek further comment rather than reaching any definitive conclusions.

Beyond the FNPRM, the CCA urged the Commission make more useful the Section 208 complaint adjudication process by more specifically describing criteria against which BDS rates are found unjust or unreasonable, or for finding unreasonably discriminatory conduct. Establishing stronger, clearer rules and a framework for more expedited review would provide greater certainty through more predictable adjudicatory principles. This will increase the utility of the BDS complaint program, encourage stakeholders to utilize the process, and make it easier for the Commission to handle many cases in a timely fashion. Particularly, CCA suggested the following:

- BDS providers should not be allowed to discriminate against wireless carrier customers. It should be a *per se* violation of Sections 201(b) and 202(a) to (1) charge wireless carriers more for BDS used for wireless services than BDS used for wireline services, or (2) exclude wireless carriers entirely from being able to purchase BDS on the same terms and conditions available to wireline carriers or end users.
- The FCC should adopt a rule, rather than a presumption, that wholesale BDS service rates should be lower than retail rates. Failing to adhere to this rule also should be deemed a *per se* violation of Sections 201(b) and 202(a).
- Instead of triggering “greater scrutiny,” the Commission should presume BDS rates—whether TDM or Ethernet—are not competitive where there is “evidence that given rates are materially higher than those charged by the same provider for the same circuit in nearby buildings” or “evidence of rates for low-bandwidth Ethernet service that are

⁴ *Business Data Services in an Internet Protocol Environment, et al.*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Red 4723, 4830, 4832, 4840 ¶ 271 (2016) (“[T]he data and our analysis suggests that competition is lacking in BDS at or below 50 Mbps in many circumstances...”).

⁵ Many competitive carriers still use traditional TDM—chiefly DS1s and DS3s—for wireless backhaul, especially in rural areas where high-capacity Ethernet is not available. CCA Comments at 3.

⁶ See CCA Reply Comments at 20-24.

materially higher than rates for the nearest-bandwidth TDM rates.”⁷ It is appropriate to shift the burden of proof to the BDS provider offering this critical input at uneven rates.

Similarly, to expedite the complaint process, the Commission should establish firm timelines for the pre-complaint, staff-supervised mediation process, as well as timelines for important milestones within the complaint process. For example, the FCC should adopt submission deadlines for relevant pricing data. Further, the FCC should not require use of the entire mediation period if progress is not being made or if the deciding issues are legal rather than factual. CCA noted it supports a 20-day pre-complaint mediation process. At least, the Commission should clearly establish that the FCC must stay within the current 5-month timeframe for a Section 208 dispute when regulating BDS.⁸

CCA expressed its appreciation for the Commission finally acting on BDS reform. With CCA’s proposed changes, the BDS item can help speed next generation wireless deployments in the short-term and 5G deployments in the long-term.

This letter is being filed electronically, in accordance with Section 1.1206(b), for inclusion in the record in the above-referenced proceedings.

Respectfully submitted,

Rebecca Murphy Thompson
EVP & General Counsel

COMPETITIVE CARRIERS ASSOCIATION
805 15th Street, N.W.
Suite 401
Washington, D.C. 20005

cc: travis.litman@fcc.gov

⁷ Fact Sheet at 2.

⁸ See 47 U.S. Code § 208(b)(1).